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SUBJECT: MEP ANGST OVER U.S.-EU TFTP/SWIFT DATA NEGOTIATIONS

1. (SBU) SUMMARY: On September 16, minority European Parliament (EP) parties (Greens and Communists) vehemently denounced U.S.-EU negotiations on an interim agreement to continue the Terrorist Finance Tracking Program (TFTP) once SWIFT, the Belgium-based global financial messaging company, relocates relevant data to the Netherlands by the end of 2009. A plurality of parties, however, offered cautious political approval under certain conditions. The Christian Democrats, Socialists, Liberals and Conservatives jointly tabled a (non-binding) resolution adopted in plenary on September 17. Greens and Communists failed to pass amendments and competing draft resolutions aimed to suspend U.S.-EU negotiations. During the September 16 session, Swedish Presidency Justice Minister Beatrice Ask and Commission Vice President for Justice, Freedom and Security Jacques Barrot defended the Council and Commission's approach to the U.S. in support of the TFTP, calling attention to the program's contributions to the safety and security of the EU, having revealed terrorist plots and prevented terrorist attacks on EU soil. Opponents heatedly dismissed the Presidency and Commission's repeated efforts to explain the reasons for urgency in advance of the Lisbon Treaty, confidentiality of the negotiations, and value of the program. The adopted resolution asserts specific conditions the EU must impose on the U.S. before entering into agreement. Should the Lisbon Treaty enter into force, a permanent U.S.-EU agreement must be renegotiated with EP consent. END SUMMARY.

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MEPs Square Off with Presidency, Commission  
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2. (U) On September 16, the Swedish EU Presidency and the Effered statemenreement to the EuropePresidency andlied at the end of the debQ`h Justice Minister BeauirQ its approval. Theerscored the interim/time draft agreement and saQion had already decided to propose a new agreement as soon as the new Treaty was in force. She said the Preside cy was firmly convinced of the usefulness of the program, but also wanted to ensure a Qechanism was in place to guarantee individuaQ data protection and integrity. The Minister said the agreement must go "further than the oe-sided [U.S. Treasury] representations of 2007." She added that data must be kept in a safe way, logged, searches restricted, only appointed individuals could search with well founded reason to believe terrorist or terrorism financing activity was taking place, and that data retention must be limited and ended as soon as possible or within 5 years. She added that neither the U.S. nor the EU may use the data for non-terrorism related purposes and that "the transfer must be proportional, and appraised by the Presidency, the Commission, and two people from EU Member State Data Protection" Authorities.

4. (U) Commission Vice President & Commissioner for Justice, Freedom & Security Jacques Barrot stood in line with the Presidency, reminding the EP of the various sessions they had already discussed regarding timing, urgency, and value of the program. "This analysis enables U.S. authorities to prevent and investigate attacks both in the U.S. and EU", he said. The U.S. had also respected safeguards, limited access & retention, and restricted use to terrorist purposes. According to Barrot, an interim agreement was essential, and must be "immediately renegotiated with the full European Parliament" (after entry into force of the Lisbon Treaty). He was very happy this was based on reciprocity across the board and joint efforts.

5. (U) On behalf of the Christian Democrat European People's Party (EPP) -- with 265 members, the largest group of the 735 EP members -- German MEP Ernst Strasser stressed that the U.S. was an important partner in the fight against terrorism, but added that the agreement

should respect European data protection regulations and citizens' rights. Strasser listed 6 points that were essential to EPP support for a U.S.-EU agreement:

- 1) there should be a balance between the security of citizens and citizens' rights;
- 2) the agreement should provide legal certainty for the companies involved and for EU citizens;
- 3) the co-decision role of the European Parliament after entry into force of the Lisbon Treaty should be respected;
- 4) European data must be handled under EU Law;
- 5) an instrument comparable to the TFTP should be introduced at EU level;
- 6) there should be full reciprocity between the EU and the U.S.

16. (U) The spokesman for the Socialist and Democrat Group (S&D) -- with 184 members, the second largest EP group -- Claude Moraes, called SWIFT "a testing ground for getting the balance right between our (the EU's) cooperation with the United States, fighting terrorism and protecting our fundamental rights". He welcomed the transfer of SWIFT's servers to Europe and the creation of a new legal framework in order for the U.S. TFTP to continue using and processing data in cooperation with the EU's law enforcement authorities. Moraes did stress, however, that "some key questions" were left open, i.e.: "If U.S. legal standards continue to apply on EU soil for the processing of EU data, how can we guarantee respect for EU standards regarding procedural rights and the protection of personal data? To which judge can an EU citizen or an EU enterprise go in the case of criminal prosecution?" He insisted that the interim agreement should apply only for 12 months and that a new agreement should be negotiated with Parliament as co-legislator, to respect "the delicate balance of protecting the fundamental rights of European citizens in the important and critical fight against terrorism".

17. (U) Dutch MEP Sophia in't Veld, speaking on behalf of the 84 members of the Alliance of Liberals and Democrats for Europe (ALDE), chided that it should go without saying that the agreement respect European data protection standards. She mainly criticized the opaque manner by which the Council was taking decisions about EU citizens and demanded evidence demonstrating the need for such programs as TFTP, transfer of Passenger Name Record (PNR) data, and data retention. "The fight against terrorism has almost become a runaway train, whereby the Council shows complete contempt for European citizens and democracy", she said. In't Veld wondered why the Council had presented the draft agreement only this summer, while it was known already in 2007 that SWIFT's architecture would be changed by the end of 2009. She suggested that the reason for Council's failure to consult national parliaments about its negotiating mandate was the wish by EU governments to gain access to data of EU citizens via the American government. The Dutch politician finally called for publication of the legal advice that was drawn up by the Council General Secretariat's Legal Services. Directly after the debate had been closed, Ms. In't Veld interjected a complaint under guise of a Point of Order that Minister Ask had not responded to any of her questions and requested a written response.

18. (U) The 55 member-strong Greens group was represented by German MEP Jan Philipp Albrecht, who called upon the Swedish Presidency to halt the negotiations until it could guarantee respect of the rights of citizens and parliaments. He said: "The cow-trading with bank data without binding protection mechanisms, equals the clearance sale of the data protection rights of European citizens and makes all citizens suspects from the outset".

19. (U) Marie-Christine Vergiat of the GUE/NGL Group (European United Left) called the EU's backing of TFTP "a scandal" and said the EU "must suspend the agreement" because of its breach of EU values. (NOTE: The Communists subsequently issued a press release to this effect. END NOTE.)

10. (SBU) Swedish Justice Minister Beatrice Ask and Commissioner Barrot kept their cool throughout the heated debate. Barrot said the EU would never agree if the U.S. did not provide data protection assurances and guard against commercial espionage. He patiently explained the reasons for the timing and highlighted the report drawn up by French Judge Bruguiere, who, on behalf of the EU, reviewed the respect by U.S. authorities of the safeguards in the handling of personal data included in the U.S. Treasury TFTP Representations. Minister Ask said the agreement must have a "high level of efficiency with clear and demanding conditions; if we

don't, we won't agree." But she signaled that negotiations required give and take, and though happy by the open debate, she could not divulge contents of the current negotiation. Justice Minister Ask

also highlighted the Bruguere Report as showing the U.S. had honored its commitments and described how further evaluations would continue to ensure this. She explained that databases can only be accessed under specific criteria (e.g., suspected terrorism / terrorism financing).

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Resolution Adopted on Sept. 17  
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11. (U) The European Parliament adopted the following resolution on September 17, 2009:

BEGIN TEXT:

European Parliament resolution of 17 September 2009 on the envisaged international agreement to make available to the United States Treasury Department financial payment messaging data to prevent and combat terrorism and terrorist financing

The European Parliament,

- having regard to Article 6(2) of the Treaty on European Union and Article 286 of the EC Treaty,
- having regard to Articles 95 and 300 of the EC Treaty,
- having regard to the European Convention on Human Rights, in particular Articles 5, 6, 7 and 8 thereof,
- having regard to the Charter of Fundamental Rights of the European Union, in particular Articles 7, 8, 47, 48 and 49 thereof,
- having regard to Council of Europe Convention No 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data,
- having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data,
- having regard to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data,
- having regard to Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and Regulation (EC) No 1781/2006 of the European Parliament and of the Council of 15 November 2006 on information on the payer accompanying transfers of funds,
- having regard to the Agreement on mutual legal assistance between the European Union and the United States of America of 25 June 2003, in particular Article 4 thereof (on identification of bank information),
- having regard to the US Terrorist Finance Tracking Program (TFTP) based on US Presidential Executive Order 13224, which, in the event of a national emergency, authorises notably the US Treasury Department to obtain, by means of "administrative subpoenas", sets of financial messaging data transiting over financial message networks such as the ones managed by the Society for Worldwide Interbank Financial Telecommunications (SWIFT),
- having regard to the conditions established by the US Treasury Department to access the SWIFT data (as defined by the US representations) and taking account of the information obtained by the Commission via the "eminent person" on the US authorities' compliance with the representations referred to above,
- having regard to its previous resolutions inviting SWIFT to comply strictly with the EU legal framework, notably when European financial transactions take place on EU territory,
- having regard to the negotiating directives for the Presidency

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of the Council and the envisaged international agreement between the EU and the US on the transfer of SWIFT data, which have been classified "EU Restricted",

- having regard to the opinion of the European Data Protection Supervisor of 3 July 2009, which has been classified "EU Restricted",
- having regard to Rule 110(2) of its Rules of Procedure,

1A. whereas SWIFT announced in October 2007 a new messaging structure to be operational by the end of 2009,

1B. whereas this change in messaging structure would have the consequence that the majority of the financial data that SWIFT had thus far been subpoenaed to transfer to the US Treasury Department's TFTP would no longer be made available to the TFTP,

1C. whereas on 27 July 2009 the Council unanimously adopted the negotiating directives for the negotiation by the Presidency, assisted by the Commission, of an international agreement with the US, on the basis of Articles 24 and 38 of the Treaty on European Union, to continue the transfer of SWIFT data to the US TFTP,

1D. whereas the negotiating directives, together with the legal opinion on the choice of legal basis issued by the Council's Legal Service, have not been made public, since they are classified "EU Restricted",

1E. whereas the international agreement will provide for provisional and immediate application from the time of signature until entry into force of the agreement,

1F. whereas the EU itself does not have a TFTP in place,

1G. whereas access to data managed by SWIFT makes it potentially possible to detect not only transfers linked to illegal activities but also information on the economic activities of the individuals and countries concerned, and could thus be misused for large-scale forms of economic and industrial espionage,

1H. whereas SWIFT concluded with the United States Treasury Department a memorandum of understanding which narrowed the scope of data transferred and confined the scope of data searches to specific counter-terrorism cases, and subjected such transfers and searches to independent oversight and audit, including real-time monitoring,

1I. whereas any EU-US agreement must be conditional upon maintaining the protection which exists in the memorandum of understanding and the US Treasury representations, such as those that apply in the case of data subpoenaed from SWIFT's US operating centre by the US Treasury Department,

11. Recalls its determination to fight terrorism and its firm belief in the need to strike the right balance between security measures and the protection of civil liberties and fundamental rights, while ensuring the utmost respect for privacy and data protection; reaffirms that necessity and proportionality are key principles without which the fight against terrorism will never be effective;

12. Stresses that the European Union is based on the rule of law and that all transfers of European personal data to third countries for security purposes should respect procedural guarantees and defence rights and comply with data-protection legislation at national and European level;

13. Reminds the Council and the Commission that, within the transatlantic framework of the EU-US agreement on legal assistance, which will enter into force on 1 January 2010, Article 4 provides for access to be granted to targeted financial data upon request, through national state authorities, and that this might constitute a sounder legal basis for the transfer of SWIFT data than the proposed interim agreement, and asks the Council and the Commission to explain the need for an interim agreement;

14. Welcomes SWIFT's decision in June 2007 to relocate all intra-EU financial transfer data to two European operating centres; draws the Council's attention to the fact that this decision was taken in accordance with the Belgian Data Protection Authority and the request from the EU's Article 29 Working Party and in line with the view expressed by the European Parliament;

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15. Notes that the Council did not adopt the negotiating directives that an inng terrx `ps` granted the same defence rights and procedural guarantees and the same right of access to justice as exist in the EU and that the legality and

e) that transferred data are subject to the same judicial redress mechanisms as would compensation in the event of unlawful processing of personal data;

f) that the agreement prohibits any use of SWIFT data by US authorities for purposes other than those linked to terrorism financing, and that the transfer of such data to third parties other than the public authorities in charge of the fight against terrorism financing is also prohibited;

g) that a reciprocity mechanism is strictly adhered to, obliging the competent US authorities to transfer relevant financial messaging data to the competent EU authorities, upon request;

h) that the agreement is expressly set up for an intermediate period by means of a sunset clause not exceeding 12 months, and without prejudice to the procedure to be followed under the Lisbon Treaty for the possible conclusion of a new agreement in this

field;

i) that the interim agreement clearly provides for the US authorities to be notified forthwith after the entry into force of the Lisbon Treaty and that a possible new agreement will be negotiated under the new EU legal framework that fully involves the European Parliament and national parliaments;

18. Requests the Council and the Commission to clarify the precise role of the "public authority" to be designated with responsibility to receive requests from the US Treasury Department, taking into account in particular the nature of the powers vested in such an "authority" and the way in which such powers could be enforced;

19. Requests the Council and the Commission to confirm that batches and large files such as those concerning transactions relating to the Single European Payment Area (SEPA) fall outside the scope of the data to be requested by or transferred to the US Treasury Department;

10. Stresses that SWIFT is a key infrastructure for the resilience of Europe's payment systems and securities markets and should be not be unfairly disadvantaged vis-à-vis competing financial message providers;

11. Underlines the importance of legal certainty and immunity for citizens and private organisations subject to data transfers under such arrangements as the proposed EU-US agreement;

12. Notes that it may be useful for the Commission to evaluate the necessity of setting up a European TFTP;

13. Requests the Commission and the Presidency to ensure that the European Parliament and all national parliaments will be given full access to the negotiation documents and directives;

14. Instructs its President to forward this resolution to the Council, the Commission, the European Central Bank, the governments and parliaments of the Member States and candidate countries, and

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the United States Government and the two Chambers of Congress.

END TEXT.

12. (SBU) COMMENT: USEU will continue to work with State, Treasury, and Justice representatives to appropriately engage EU and EP stakeholders in promoting a successful conclusion of the interim U.S.-EU international agreement on the TFTP. Such support will be essential in the event of negotiating a longer-term binding agreement. END COMMENT.

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